SUPREME COURT, U. S.
SEP 26 19
MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-347

PROGRESSIVE FINANCE CO.
Respondent,

vs.

WILLIAM G. BIERMAN and JUNE M. BIERMAN
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

DAVID J. BOYD
Attorney for Petitioners

LUKEN & BOYD
1003 First National Bank Bldg.
Cincinnati, Ohio 45202
241-2382

RICHARD P. SCHULER
Attorney for Respondent
700 Provident Bank Bldg.
Cincinnati, Ohio 45202
621-1776

DONALD L. WEBER
Attorney for Rossi Music Studio
201 Second National Bldg.
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioners, William G. Bierman and June M. Bierman, respectfully pray that a Writ of Certiorari issue to review the Final Entry of the Supreme Court of Ohio, entered in the proceeding on June 14, 1974.

CITATION TO OPINION BELOW

The Final Entry of the Supreme Court of Ohio, denying Appeal to the Supreme Court of Ohio in this cause appears in the Appendix attached hereto. No formal opinion has been rendered.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 14, 1974. This petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254 (1).

QUESTION PRESENTED

Whether the entry of a default judgment, in a civil action against Defendants who had a bona fide reason for not being present in Court, merely because the case was old, constitutes taking of property without due process of law.

STATEMENT OF THE CASE

The within case was set for trial on Respondent's Complaint on March 16, 1973. During the latter part of March 14, 1973, counsel for the Petitioner, who had just completed a lengthy criminal trial in the United States District Court, Southern District of Ohio, contacted his client, to go over her testimony, preparatory to the trial on the following Friday. He was advised, during the course of the conversation, that she had been ill and was presently hospitalized, and that on the advice of her physician, she was not allowed to leave the home, and certainly was not allowed to appear as a witness and party in the civil case. Counsel for Petitioner advised her that if the matter was to be continued for medical reasons, he would indeed need a medical report to submit to the Court, to justify her not appearing. Following that conversation on the same day, counsel for Petitioner 'phoned counsel for the Respondent and advised him of the hospitalization and illness of the Petitioner and the fact that a continuance would be requested. Counsel for the Respondent replied that if medical proof of illness were submitted, that he would not object to a continuance. Counsel for Petitioner received a medical report on the morning of March 16, 1973, the date of trial.

The Hamilton County Municipal Court, in which this cause was to be tried had on March 5, 1973, changed its trial docket procedure, so that cases which formerly started at 9:00 A.M. now started at 1:00 P.M. Shortly before coun-

sel for the Petitioner was to leave for the Court House, an individual for whom counsel for Petitioner is guardian, came into the office with an emergency problem which needed immediate attention. As a result there was a delay in his getting to the Court House, arriving some ten minutes after Court had started. The Court had not only the instant case scheduled, but also six other cases on the docket for trial, at the same time. Despite the fact that counsel for the Petitioner advised the Attorney for Respondent that a medical request for continuance would be submitted to the Court, a Default Judgment was granted in Petitioner's counsel's ten minute absence. Petitioner thereafter filed a Motion to Vacate Default Judgment, attaching a copy of her medical statement as part of the Motion. The matter was heard before the Court on April 12, 1973, at which time the Court overruled the Motion, on the proposition, not that the Petitioner was not sick or unable to attend, but simply that the case had been around for a long time, and should, in effect, be disposed of.

Petitioners thereafter perfected an appeal to the Court of Appeals for the First District of Ohio, which, after oral argument, rendered its decision on February 4, 1974, affirming the judgment of the Hamilton County Municipal Court (See Exhibit "A"). Thereafter, notice of appeal was filed in the First District Court of Appeals on March 1, 1974 (See Exhibit "B"). On appeal to the Supreme Court of Ohio, the Supreme Court of Ohio by Order of June 14, 1974 refused to hear the case as it "did not raise a constitutional issue." (Exhibit C)

REASONS FOR GRANTING THE WRIT

Petitioners were deprived of due process of law as granted in the 14th Amendment, in that a default judgment was entered against Petitioners and a Motion to set aside the default was denied, when both the opposing counsel and the Court were advised that Petitioner was very ill and unable to appear in Court.

Counsel for the Petitioner attached to the Motion To Vacate The Default Judgment, which was filed with the Hamilton County Municipal Court, a medical statement of Dr. Harry A. Blaney, a doctor of medicine in the State of Ohio, which stated that the Petitioner had only been released from the hospital approximately one (1) week before the case was set for trial, and that he told her not to appear because of her physical condition, in Court, on the day the case was set for trial. Counsel for the Petitioner also stated professionally into the record, that he had advised counsel for Respondent, on March 14, 1973, two days before the trial date, that his client had advised him of her medical condition and that she would not be able to appear at trial. The medical statements and the representations of counsel for the Petitioner were not challenged by the Respondent. To the contrary, counsel for Respondent advised counsel for Petitioner, during their 'phone conversation on March 14, 1973, that if Petitioner's illness were substantiated by a medical statement, he would have no objection to the matter being continued.

Despite Petitioner's medical statement and the representations of her counsel, the trial court granted a default judgment against the Petitioner. The lower court did so, not on the basis that it did not accept the medical statement, or that it found the statements to be untrue or inaccurate or that Petitioner was not really ill and was able

to appear in Court, but rather on the premise that the case was an old one and that there was a prior occasion on which Petitioner was unable to appear in Court because of illness. The record shows that the Petitioner only requested a continuance on the two occasions. Both times she was ill and unable to attend Court. The delay, otherwise, was caused by the death of her husband, William G. Bierman, which made it incumbent upon Petitioner to suggest death into the record and to submit herself as Executrix of her late husband's estate as a party in his place instead. An additional delay was caused by Respondent in discharging his original counsel and neglecting, for a substantial period of time, to obtain new counsel, during which time Petitioner did not oppose continuances requested by the Respondent to obtain new counsel.

It is submitted that the lower court committed an unconstitutional abuse of its discretion in granting a default judgment against the Petitioner, at a time when the Petitioner was under medical care and advised by her doctor that it would be detrimental to her health to appear in Court for trial.

Section 1. of the 14th Amendment to the Constitution states, in part, "Nor shall any State deprive any person of life, liberty or property, without due process of law . . ." There is no doubt that the Petitioner was deprived of property when the Hamilton County Municipal Court entered a default judgment against her in the amount of $600.48.

The facts of this case are undisputed, leaving only the question as to whether the due process of law provisions of the Constitution are violated when one is offered a mere, theoretical day in Court rather than a real day in Court.

It is not argued here that this case was not old. It was old, but many different circumstances led to that fact. But,

that alone, cannot be grounds for default judgment against the Petitioner, without same fault of her own. Default Judgment is an extreme remedy and should only be used when the defaulting party has, in some manner, caused an intentional or negligent delay in proceedings. *E. F. Hutton & Co.* v. *Moffatt* 460 F. 2d 284 (5th Cir. 1972)

The Due Process Clause guarantees that every person has the right to be heard. *Pink* v. *Highway Express* 191 Ga. 502, 13 S.E. 2d 337, affirmed 314 U.S. 201. Such a right to be heard is at the basic aspect of duty of government to follow a fair decision making process. *Fuentes* v. *Shevin* 407 U.S. 67 (1972)

The key to providing such due process protection is affording every person aggrieved, the opportunity to appear and be heard. *Hanley* v. *Four Corners Vacation Properties* 480 F. 2d 536 (10th Cir., 1973). *Vail* v. *Board of Education of Portsmouth School* 354 F. Supp. 592 (D.C. N.H. 1973). The key word is "opportunity."

It is submitted that a mere theoretical opportunity to appear and be heard is no opportunity at all. In the instant case, the cause was set for trial, petitioner and petitioner's counsel both had notice of the time and place of the trial and theoretically could have appeared.

However, it cannot be within the doctrine of due process that one must leave a sick bed, having just been released from a hospital, to appear and be heard or else forfeit that right.

The standard for determining whether procedural due process has been properly applied is whether one is treated with fundamental fairness in light of the total circumstances. *Davis* v. *Ann Arbor Public Schools* 313 F. Supp 1217 (D.C. Mich, 1970). Certainly the high standards of procedural due process are not met in the present circumstances and should be reviewed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

DAVID J. BOYD
Attorney for Petitioners

LUKEN & BOYD
1003 First National Bank Bldg.
Cincinnati, Ohio 45202
241-2382

EXHIBIT "A"

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON, COUNTY, OHIO

No. C-73232

PROGRESSIVE FINANCE CO.
Plaintiff-Appellee,

vs.

WILLIAM G. BIERMAN

and

JUNE M. BIERMAN,
Defendants-Appellants,

and

ROSSI MUSIC STUDIO
Third Party
Defendant-Appellee.

DECISION

(Filed February 4, 1974)

Mr. Richard P. Schuler, 700 Provident Bank Building, Cincinnati, Ohio 45202, for Plantiff-Appellee, Progressive Finance Co.,

Mr. David J. Boyd, 1003 First National Bank Building, Cincinnati, Ohio 45202, for Defendants-Appellants, William G. and June M. Bierman,

Mr. Donald L. Weber, 201 Second National Building, Cincinnati, Ohio 45202, for Third Party Defendant-Appellee, Rossi Music Studio.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries, the original papers and pleadings from the Hamilton County Municipal Court, the transcript of the proceedings, the assignment of error, the brief of the appellant and arguments of counsel.

The notice of appeal states that the appeal is taken from the decision of the court overruling the motion of the defendant to vacate a default judgment.

However, the assignment of error is that the court abused its discretion in granting a default judgment against the defendant and dismissing the third party claim.

The appellee elected not to file a brief, stating in open court through counsel that the record spoke for itself and needed no amplification by brief.

Because of the peculiar history of the case, we have chosen to dispose of it upon the issue broached by the assignment of error considered in light of the action of the court in granting a default judgment.

The case involves an action to recover $600.48 upon a cognovit note which was filed September 23, 1969. Judgment by confession was taken October 15, 1969. After a certificate of judgment for lien upon lands and tenements was issued, a motion to vacate default judgment was filed on November 19, 1969. On November 28, 1969, an answer was filed in the form of a general denial of the allegations in the complaint. The motion to vacate the default judgment was granted December 16, 1969. On April 7, 1970, the court granted leave to file a third party petition and on

April 10, 1970, defendants-appellants filed such petition and the answer thereto was filed April 22, 1970. After a number of continuances for trial, a default judgment was granted the plaintiff-appellee on November 5, 1971. The entry recites that the defendant failed to appear but noted the presence in court of counsel for the defendant. The third party petition was dismissed by the court.

On November 19, 1971, the rendition of the default judgment and dismissal of the third party petition was appealed and this court, on April 24, 1972, reversed the judgment and remanded the cause on the ground that the trial court had abused its discretion in refusing to grant a continuance because of the illness of defendant, June M. Bierman.

Again, there follows a series of continuances until March 16, 1973, when the court for the third time granted a default judgment after the case was called and the defendant failed to appear.

On March 23, 1973, Mrs. Bierman moved the court to set aside the default judgment for the reason "that she was sick and unable to attend court". A certificate of a physician was attached to the motion.

On April 11, 1973, a hearing was had on that motion. The transcript of that proceeding reveals that counsel for Mrs. Bierman stated to the court that on March 14, 1973, his client advised him of her recent release from hospitalization, that her physician advised against a court appearance, that counsel then informed his opponent of the situation and that he would request a continuance. Mrs. Bierman's counsel stated, further, that office business prevented his appearance in court on March 16, 1973, when the case was called for trial. The court overruled the motion to vacate the judgment and on April 27, 1973, notice of appeal was filed.

This case, to us, presents the all too familiar pattern of delay after delay in disposition of what is, essentially, a simple matter. The suit is upon a note, the answer is a general denial, the third party petition, inter alia, alleges fraud and misrepresentation. The total amount of money involved is slightly more than $600.00. Repeatedly, the court offered opportunity for trial of the issues but for reasons not spread upon the record continuances were had. Even after this Court reversed a default judgment and remanded the cause for trial, the opportunities thereafter presented to have the issues resolved were not taken. Now, we have before us the same question presented for review, that is, did the trial court abuse its discretion in granting a default judgment.

We can find no reason based upon the record to find that it did.

Therefore, the judgment of the Hamilton County Municipal Court is affirmed.

HESS, P. J., SHANNON and PALMER, J. J.

PLEASE NOTE: The Court has placed of record its own entry in this case on the date of the release of this Decision.

EXHIBIT "B"

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-73232

PROGRESSIVE FINANCE CO.
Plaintiff-Appellee,

vs.

WILLIAM G. BIERMAN

and

JUNE M. BIERMAN
Defendants-Appellants,

and

ROSSI MUSIC STUDIO
Third Party
Defendant-Appellee.

NOTICE OF APPEAL

(Filed March 1, 1973)

Now comes the Defendants-Appellants, William G. Bierman and June M. Bierman, and hereby give Notice of Appeal to the Supreme Court of Ohio, from the judgment entered in the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, on the 4th day of February, 1974; this case is one which did not originate in the Court of Appeals.

This case does involve substantial Constitutional questions, and is one of great public interest.

. . . . . .

DAVID J. BOYD
Attorney for Defendants-Appellants

TAFT, LUKEN & BOYD
1003 First National Bank Bldg.
Cincinnati, Ohio 45202
241-2382

PROOF OF SERVICE

The undersigned, attorney for the Defendants-Appellants, hereby certifies that a copy of the foregoing Notice of Appeal, was sent by regular mail on the 2nd day of March, 1974, to Richard P. Schuler, attorney for Plaintiff-Appellee, 700 Provident Bank Bldg., Cincinnati, Ohio and Donald L. Weber, attorney for Third Party Defendant-Appellee, 201 Second National Building, Cincinnati, Ohio.

. . . . . .

DAVID J. BOYD
Attorney for Defendants-Appellants

EXHIBIT "C"

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.

1974 Term

To wit: June 14, 1974

No. 74-294

PROGRESSIVE FINANCE CO., Appellee,

vs.

WILLIAM G. BIERMAN et al., Appellants; et al.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal, for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.